ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1437

NEW YORK UNIVERSITY,

Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Appeal from the National Labor Relations Board

REPLY BRIEF OF PETITIONER/CROSS-RESPONDENT

Michael J. Volpe
Moxila A. Upadhyaya
Benjamin E. Stockman
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 344-4690
Facsimile: (202) 344-8300
maupadhyaya@Venable.com
mjvolpe@Venable.com
bestockman@Venable.com

Attorneys for Petitioner/Cross-Respondent New York University

August 2, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

GLOSSARY OF ABBREVIATIONS

ADRSS	Access, Delivery and Resource Sharing Services
ALJ	Administrative Law Judge
CBA	Collective Bargaining Agreement
NLRA	National Labor Relations Act
NLRB	National Labor Relations Board
NYU	Petitioner New York University

STATUTES AND REGULATIONS

All relevant statutes and regulations are set forth in the opening brief.

SUMMARY OF ARGUMENT

In an exercise of its collectively bargained-for rights, Petitioner New York University ("NYU") revised the job descriptions of ADRSS employees to address operational needs, increase staffing flexibility and opportunities for employee professional development. Despite express contractual language vesting NYU with this unilateral right, the Intervenor, Union of Clerical, Administrative and Technical Staff at NYU(Intervenor or the "Union") improperly demanded bargaining over the job description changes and filed an unfair labor practice charge at the NLRB seeking to force NYU to bargain over the changes. The Board rejected the Union's plea for bargaining over NYU's decision to change job duties, but found that NYU owed an "effects" bargaining obligation based on the type of artificial contract interpretation that this Court has repeatedly rejected in cases such as Enloe Med. Ctr. v. N.L.R.B., 433 F.3d 834, 839 (D.C. Cir. 2005), and most recently in the case of Heartland Plymouth Court MI, LLC v. N.L.R.B., No. 15-1034 (D.C. Cir. May 3, 2016).

In its final order, the Board adopted the ALJ's erroneous application of the "clear and unmistakable waiver" standard. In doing so, the Board contradicted the "covered by" contractual analysis that this Court has applied time and again in interpreting collective bargaining agreements. The express terms of the CBA at

issue here clearly and unequivocally cover all bargaining issues related to job description and duty changes. Nothing in the CBA or the bargaining history provides even the slightest hint that the Union intended to carve out and reserve an effects bargaining right separate and distinct from NYU's unilateral right to change job descriptions without bargaining. The Union's Intervenor brief removed any doubt that it views its purported "effects bargaining" rights as inherently intertwined with and indistinguishable from the decisional bargaining rights. As the Intervenor brief makes clear, the Union sought bargaining over NYU's *decision* to change job duties all along. The Board's artificial construction of an effects bargaining right for the Union overlooks the clear terms agreed to by the parties in the CBA, and expressly contradicts the law of this Circuit. The Board's failure to apply this Court's "covered by" analysis was clear and prejudicial error.

ARGUMENT

I. THE CBA COVERS THE SUBJECT OF JOB DESCRIPTION CHANGES AND THERE IS NO EVIDENCE THAT THE PARTIES INTENDED TO TREAT "EFFECTS" BARGAINING SEPARATELY FROM DECISIONAL BARGAINING.

It bears repeating: "the federal judiciary does not defer to the Board's interpretation of a [CBA]." Enloe, 433 F.3d at 837. The only question presented in this matter is whether NYU had an effects bargaining obligation under the NLRA given the plain terms of the CBA between the parties. This question is conclusively answered in NYU's favor by the Court's unequivocal holding in Enloe, 433 F.3d at 837-39.

A. This Court Has Reaffirmed Its Commitment to the "Covered By" Standard and Its Rejection of the Board's Artificial Standard.

This Court reaffirmed its commitment to the "covered-by" standard in the recently decided Heartland Plymouth case by finding that "[t]he Board's refusal to adhere to our precedent dooms its decision before this court." Heartland Plymouth Court MI, LLC v. N.L.R.B., No. 15-1034, Doc. No. 1611466, at 2 of 3 (unpublished disposition annexed to this memorandum at the Addendum). The Board here has committed the same legal error that it did in Enloe and Heartland Plymouth. It rejected the well-settled law of this Circuit in favor of its artificially-constructed "clear and unmistakable waiver" standard that this Court has repeatedly struck down. See Id.; Enloe, 433 F.3d at 839.

Heartland Plymouth is illustrative of the consequences of the Board's flawed approach to contract analysis in this case. In Heartland Plymouth, this Court reviewed a Board decision which found that Heartland Plymouth Healthcare committed an unfair labor practice by refusing to bargain with the union over the effects of a reduction and reallocation of employee work hours at the Heartland Plymouth Healthcare facility. See Heartland Plymouth, Addendum at 2 of 3. The Board used the same legal justification for its finding of effects bargaining as the Board does here, namely, that the union did not "clearly and unmistakably" waive its right to bargain over the effects of a reduction and reallocation of employee work hours. Id. This Court examined the language of the applicable collective bargaining

agreement and held that the Board's application of its "clear and unmistakable waiver" standard was clear error and declined to enforce the Board's order. Id. The Court found that the plain language of the management rights clause, which empowered Heartland Plymouth to set and alter shift times, covered the topic of hours reduction and alleviated Heartland Plymouth from the obligation to bargain over any effects of work reductions. Id.

Here, as in Heartland Plymouth, NYU negotiated a strong management rights clause vesting the power in NYU to operate and manage the University, including the power "to assign, transfer, supervise and direct all working forces, to maintain discipline and efficiency among them, to determine the facilities, methods, means, equipment, procedures and personnel required to conduct activities." JA000119. The rights, functions, and prerogatives of management not expressly and specifically restricted in the CBA are retained exclusively by NYU under the management rights clause. Id. Under Heartland Plymouth, this language alone is sufficient to vest in NYU the unilateral power to make and implement the job changes without bargaining. But the CBA here goes further in its coverage of the subject of job description changes. Article 9 of the CBA expressly reserves job description and duties changes to NYU without the requirement to bargain. JA000093. The CBA here covers the subject at issue even more comprehensively than the collective bargaining agreement did in the Heartland Plymouth case. The precedent of this Circuit leaves no doubt that the Board's application of the "clear and unmistakable

waiver" standard, and its finding of an effects bargaining obligation contrary to the plain language of the CBA, is clear and prejudicial error.

It is significant that the Board failed to make any argument in its brief under the appropriate "covered by" standard which controls in this Circuit. Conspicuously, the Board does not argue that the plain language of the CBA shows "the parties intended to treat the [decisional and effects] issues separately." Enloe, 433 F.3d at 839. Since there is no plain contractual language reserving such a right to the Union, the Board instead argues that the record contains evidence of bargaining history showing the intent of the parties to treat effects bargaining separately from decisional bargaining. Brief for The National Labor Relations Board ("Board's Brief") at 23, New York University v. N.L.R.B., Nos. 15-1437, 16-1006, Doc. No. 1618590 (filed June 10, 2016). This argument is unfounded for several reasons.

B. The Record Contains No Evidence of Any Intention to Differentiate Between Decisional and Effects Bargaining.

The ALJ's decision, and the Board in adopting the decision, did not apply this Circuit's "covered by" standard as required by Enloe, and instead relied on law in direct conflict with the law of this Circuit. The ALJ did not base her decision on a finding that the bargaining history between NYU and the Union evidenced an intention to distinguish between decisional and effects bargaining under Enloe. To the contrary, the ALJ expressly rejected Enloe, and found that the Union "made no such distinction" between decisional and effects bargaining rights when it demanded

bargaining over the job description changes. JA000289, 000316. Because the ALJ expressly contravened Circuit law, the Board cannot now argue on appeal that the record supports a finding of effects bargaining under Enloe. As discussed above, the application of the wrong standard in the Board decision dooms its case before this Court.

Even if the Board's decision had applied the correct standard, there is nothing in the record that supports the Board's bald argument that the parties intended to distinguish decisional bargaining from effects bargaining. The record is clear that the Union never made such a distinction prior to the filing of its unfair labor practice charge, which the ALJ in fact noted in her decision. JA000289. The Union only made unfounded demands for negotiations over the job duty changes, which it continues to do to this very day in clear contravention of the contractual language the Union agreed to during negotiations over the CBA. The Union's brief to this Court further undermines the Board's argument that the parties distinguished effects bargaining since the Union admitted in its briefing that "there was no need for it to separately reserve the right to bargain over the effects of job description changes." See JA000136; see also Brief for Intervenor for Respondent ("Intervenor's Brief") at 2, 15, New York University v. N.L.R.B., Nos. 15-1437, 16-1006, Doc. No. 1620142 (filed June 17, 2016). The Union's concession on this point highlights, in the Union's own words, the contradictory nature of its arguments to this Court.

Despite communications between Union representative Linda Wambaugh and NYU Assistant V.P. of Employee Relations Barbara Cardeli-Arroyo, which included onerous information requests from the Union, the Union never once used the word "effects" to describe its demand for bargaining. JA000136 - 142. In fact, the Union claimed that the job description *could not be changed without Union consent*. JA000136. In this position the Union is completely alone, as not even the Board has been willing to take up this frivolous argument on the Union's behalf. The Board's Office of Appeals issued a written opinion rejecting the Union's demand for decisional bargaining. JA000257.

Enloe and Heartland Plymouth require that the Board show, at the very least, that there is contractual language or bargaining history to indicate that the parties intended to create a distinction between decisional bargaining and effects bargaining. This record simply does not exist. The Board baldly argues that Enloe can be distinguished from the case at bar based on a conclusion that the Union identified discrete effects for which it sought bargaining. But as in Enloe, the Board here concedes that the Union's bargaining requests never demanded bargaining over effects. Board's Brief at 24. Identical to the facts underlying Enloe, the Union here objected to the *decision* to change the job descriptions and sought information based on its demand to bargain over the decision itself. JA000039 – 40, 000259.

Additional portions of the record emphasize that the parties, in negotiating the CBA, never intended for effects bargaining rights to be separate and distinct from

decisional bargaining rights. The Union conceded at the ALJ hearing that when it met to discuss the anticipated job description change in early August 2013, it was focused on challenging the *decision* to change the job description, and not the *effects* of the change. JA000039 ("[W]e met and discussed issues regarding this change that we wanted to negotiate . . . ."). The bargaining unit shop steward, Ms. Smith, testified at the hearing that she did not know that NYU had the unilateral power to change the job description at the time the Union was demanding bargaining. JA000040. Moreover, the petition Ms. Smith and other bargaining unit members signed only demanded bargaining over the *change* in their job description, and not the *effects* of the change. JA000259. The Union neither invoked nor contemplated effects bargaining rights when making their demands – and certainly not when negotiating the terms of the CBA. The fact that the Board and the Union now argue that the Union's demand for decisional bargaining actually included a demand for effects bargaining merely proves NYU's point that the Union never saw the two issues distinctly, and the plain contractual language of the CBA reflects this truth.

II. INTERVENOR'S ARGUMENTS APPLY THE WRONG LEGAL STANDARD AND IGNORE THE PLAIN LANGUAGE OF THE CBA IN FAVOR OF A TORTURED CONTRACTUAL INTERPRETATION.

As discussed in great detail in this brief and NYU's opening brief to this Court, the plain language of the CBA clearly and unequivocally covers all bargaining issues related to job description and duties changes and reserves them to NYU. Based on the applicable law of this Circuit, the CBA demands judgment in

favor of NYU. Until this appeal, the Board and Union ignored this Circuit's law in favor of the "clear and unmistakable" standard. This choice now dooms the Board's decision before this Court. See Addendum, Heartland Plymouth, No. 15-1034, Doc. No. 1611466, at 2 of 3.

In an apparent attempt to adjust its tactics on appeal, the Union now makes several convoluted arguments that misconstrue the record and the law of this Circuit. The Union improperly couches the "covered by" standard as a "presumption" which it claims does not apply in this case. See Intervenor's Brief at 3. Enloe did not espouse a legal "presumption" standard, it simply applied traditional contract interpretation principles to analyze a collective bargaining agreement. See Enloe, 433 F.3d at 838-39. The Union's apparent confusion over the standard is clearly demonstrated by its reading of Dep't of Navy v. Fed. Labor Relations Auth., 962 F.2d 48, 50 (D.C. Cir. 1992), which it cites for the proposition that the erroneous "clear and unmistakable waiver" standard is applicable here. In fact, in Dep't of Navy this Court found that application of the "clear and unmistakable" standard in interpreting a collective bargaining agreement defied common sense. Id. Whatever the Union's purported basis for application of the "clear and unmistakable" standard may be, the issue here is simply whether the CBA covers the subject of job description changes, which it indisputably does.

The Union asks this Court to "'discern the parties' intent by interpreting the contract." Intervenor's Brief at 10. But he CBA is clear on the parties' intent—

through collective bargaining, NYU retained the right to change and implement job descriptions and the Union did not raise or reserve any distinction between NYU's decisional rights and the so-called effects bargaining rights. The Union has admitted that it did not view any distinction between decisional and effects bargaining rights and cannot credibly argue that it was not aware of the provisions it negotiated in its own CBA, which is what it appears to be arguing here. Id. ("To apply such analysis and to expansively define 'covered by' when an employer has made changes the union did not foresee is to ignore the underpinnings of the contract coverage analysis—that the parties already bargained over that very subject.")

The Union's alternative argument that the plain language of the CBA requires bargaining over job description changes relies on an incoherent interpretation of the CBA and should not be considered because this argument was not raised before the Board. In Point II of its brief, the Union argues for the first time in this litigation that the provisions of Articles 1, 9, 10, and 11 of the CBA, read together, preclude NYU from changing job descriptions without bargaining over the changes. Intervenor's Brief at 14. At the root of this argument is the Union's conclusory allegation that Articles 9 and 11 of the CBA mandate that NYU bargain with the Union over job classifications and descriptions. This argument is frivolous.

First, the Union does not accurately describe Article 9 of the CBA. Article 9 states in full:

> A. Each employee will have a written job description. The job description will contain the principal duties of the job, the title of the employee's immediate supervisor[s], and the grade level. It will also contain the following statement:
>
> > This description is intended to illustrate the kinds of tasks and levels of work difficulty required of the position and does not necessarily include all the related specific duties and related responsibilities of the position. It does not limit the assignment of related duties not mentioned.
>
> **A job description may be changed to meet the operating requirements of the unit, or to reflect changes which have occurred, such as the elimination or addition of specific duties.**

JA000093 (emphasis added). Article 9 does not limit NYU to adding related duties only, as the Union misstates in its brief. It expressly empowers NYU with the flexibility to change job descriptions "to meet the operating requirements of the unit, or to reflect changes which have occurred, such as the *elimination or addition* of specific duties." Id. (emphasis added). Article 10 of the CBA addresses job reclassification, which covers changes to job titles or pay grades based on existing duties. The CBA sets job reclassification as an entirely distinct management function from the changing of job descriptions. Job reclassification is not the subject of this dispute and the Union never requested a reclassification of the ADRSS employees' job title. See JA000077 - 81. Moreover, the language of Article 10 allows the Union to request reclassification of bargaining unit jobs which triggers an obligation on NYU's part to consider the request. Article 9 does not provide the Union with any mechanism for requesting review of job description changes. In

fact, Article 9 expressly bars the Union from grieving or arbitrating job description changes. JA000093. The absence in Article 9 of any rights reserved to the Union whatsoever evidences a clear intent by the parties to leave job description changes within the sole discretion of NYU. The contractual language means what it says—NYU can alter job descriptions to meet operational requirements and reflect changes, including the elimination or addition of specific duties.

Nor does Article 11 of the CBA mandate bargaining over job description changes. Article 11 is entitled "Job Classification and Job Description Meetings". It provides as follows:

> Two University representatives and two Union representatives, at the request of either party, will meet at a mutually agreeable time and place, twice during each contract year, to discuss matters relating to job classification and job description. The meetings will be scheduled for two hours and any Union representative who is a member of the bargaining unit will be released from work to attend the meeting and will be paid for the time spent at the meeting.

JA000094. The Union contends that the word "discuss" in Article 11 actually means "bargain", thus requiring NYU to bargain over job classification and job description changes. Again, this argument defies the plain language of the CBA and common sense.

As an initial matter, the Union is barred from asserting its argument under Article 11 of the CBA because it is being raised for the first time on appeal. See 29 U.S.C. § 160(e); Flagstaff Med. Ctr., Inc. v. N.L.R.B., 715 F.3d 928, 934 (D.C. Cir.

2013) (arguments not raised before the Board may be considered by the Court only in extraordinary circumstances). The Union sets forth no extraordinary circumstances justifying review of its new argument on appeal.

Moreover, the plain language of Article 11 clearly does not require bargaining over job classification and job descriptions. Article 11 uses the words "meetings", "meet", and "discuss" to describe its provisions. None of these words can reasonably be construed to mean "bargain" or "negotiate" and Intervenor cites no legal authority in this or any other Circuit in support of its artificial interpretation.[1]

This is particularly clear when Article 11 is read in the context of the CBA as a whole. The CBA specifies in other articles when NYU must "negotiate" with the Union (see Article 8(A)(3)(c)). Articles 9 and 10 expressly reserve to NYU the power to alter job descriptions and classifications without any mention of negotiation. As mandated by the management rights clause, NYU's management prerogatives may only be limited by express and specific language in the CBA. The Union sets forth no sound reasoning for its flawed conclusion that the CBA requires NYU to bargain twice a year to change job descriptions or to reclassify employees through Article 11, despite plain language explicitly empowering NYU to unilaterally change job descriptions in Article 9. The Union's tortured contract

[1] The Union cited only a concurrence in a footnote in the NLRB decision Champaign Builders Supply Co., 361 N.L.R.B. No. 153, n.1 (2014), which found an effects bargaining obligation based on the "clear and unmistakable" test which this Court has explicitly rejected.

analysis defies common sense and reason. This is particularly clear in light of the record evidence that NYU changes job descriptions in the library as frequently as 15-20 times per year, yet there is no record of the Union ever having invoked its purported right to "meet" over the changes under Article 11, including in the instance of the job description change at the root of this dispute. JA000059 - 60. The Union's "plain language" argument is merely a misguided attempt to cobble together an argument now that it is under the controlling law of this Circuit. This argument should be rejected, as even the Board rejected the Union's demand for decisional bargaining under the "clear and unmistakable" standard. JA000257.

III. THE BOARD'S ORDER IMPROPERLY INCLUDED *DE MINIMIS* EFFECTS

Effects that are ministerial in nature or temporary are not subject to bargaining. McClatchy Newspapers, Inc. d/b/a The Fresno Bee, 339 N.L.R.B. 1214 (2003) (herein "Fresno Bee"). The Board not only adopted the ALJ's flawed finding of material effects, it also expanded the ALJ's remedy to include "any of the effects" of the job description change. JA000310. By definition, this order improperly includes *de minimis* effects in violation of Board law. Fresno Bee, 339 N.L.R.B. 1214. It is undisputed that NYU made no changes to the ADRSS employees' compensation, working hours, shift schedules, supervisory structure, benefits, sick and leave time, or seniority and bumping rights. Nor did any employee receive any adverse employment action resulting from the changes. Moreover, the Board failed to identify any specific material effects in its order mandating rescission of *any* of

the effects of the job description change. Since "any effects" necessarily includes *de minimis* effects, the order is impermissibly broad and should not be enforced. Columbia College Chicago, 363 N.L.R.B. No. 154 (adopting ALJ denial of request for order to bargain over effects of "any" changes, since such an overly-broad order would encompass *de minimis* effects).

The Board's argument that NYU is barred from arguing that the Board's Order impermissibly conflicts with the ruling of the Board's Office of Appeals is unavailing. Board's Brief at 28. NYU clearly raised this issue before the Board. In its Post-Hearing Brief and its Brief in Support of Its Exceptions to the ALJ's Decision before the Board, NYU argued that any order requiring bargaining over purported effects would impermissibly include *de minimis* effects, and would conflict with the decision of the Office of Appeals. JA000297 – 98, 000280 - 81. The Board's argument that these issues were not raised is rebutted by NYU's exceptions and briefs below. In short, the Board was clearly on notice of NYU's arguments. Since these arguments were raised in its Exceptions and Exceptions Brief, NYU had no obligation to move for reconsideration to preserve its arguments for appeal. Davis Supermarkets, Inc. v. N.L.R.B., 2 F.3d 1162, 1174-75 (D.C. Cir. 1993) (exceptions to ALJ's proposed decision sufficient to preserve arguments for appeal).

CONCLUSION

In light of the Board's failure to apply the proper standard under the law of this Circuit, NYU respectfully requests that the Court grant its petition for review and decline to enforce the Board's Order.

Dated: Washington, D.C.
August 2, 2016

Respectfully submitted,

/s/ Moxila A. Upadhyaya
Michael J. Volpe
Moxila A. Upadhyaya
Benjamin E. Stockman
VENABLE LLP
575 7th Street, N.W.
Washington, D.C. 20004
Telephone: (202) 344-4690
Facsimile: (202) 344-8300
maupadhyaya@Venable.com
mjvolpe@Venable.com
bestockman@Venable.com

Attorneys for Petitioner/Cross-Respondent New York University

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7) and D.C. Circuit Rule 32(a)(1), I hereby certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains **3,811** words.

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), I have relied upon the word count feature of this word processing system in preparing this certificate.

Dated: Washington, D.C.
August 2, 2016

/s/ Moxila A. Upadhyaya
Moxila A. Upadhyaya

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 2nd day of August, 2016, I caused this Reply Brief of Petitioner/Cross-Respondent to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Linda Dreeben
Robert J. Englehart
Kellie J. Isbell
National Labor Relations Board
Appellate and Supreme Court Litigation Branch
1015 Half Street SE
Washington, DC 20570
(202) 273-1000

Attorneys for Respondent/Cross-Petitioner
National Labor Relations Board

Katherine H. Hansen
GLADSTEIN, REIF & MEGINNISS, LLP
817 Broadway, 6th Floor
New York, NY 10003
(212) 228 – 7727

Attorneys for Intervenor Union of Clerical,
Administrative and Technical Staff at NYU
Local 3882, NYSUT, AFT, AFL-CIO

/s/ Moxila A. Upadhyaya
Moxila A. Upadhyaya